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Supreme Court of the United States

OCTOBER TERM, 1952

No. 706

ELIZABETH B. MAYS, SOLE LEGATEE OF THE ESTATE OF FRED L. MAYS, DECEASED, PETITIONER,

versus

WILLIAM P. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF SOUTH CAROLINA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH SUPPORTING BRIEF

JOHN H. LUMPKIN,
Counsel for Petitioner.

BOYD, BRUTON & LUMPKIN,
Of Counsel.

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INDEX

PAGE

Petition for Writ of Certiorari:

Summary Statement of the Matter Involved..... 1

Jurisdictional Statement 2

Question Presented 2

Reasons Relied on for Allowance of the Writ..... 3

Supporting Brief:

Statement of Case 5

Argument 5

CITATIONS

PAGE

Commissioner v. Heininger, 320 U. S. 90, 64 S. Ct. 249.. 6

Lilly et al. v. Commissioner, 343 U. S. 90, 72 S. Ct. 497... 6

McDonald v. Commissioner, 323 U. S. 57, 65 S. Ct. 96...3, 5

United Profit-Sharing Corporation v. The United States, 66 Ct. Cls. 171 (1928) 6

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH SUPPORTING BRIEF

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was brought in 1951 in the United States District Court for the Eastern District of South Carolina for refund of federal income taxes for the calendar years

1946 and 1947. All of the facts were stipulated (R. 5-7). By order dated July 29, 1952, the District Court granted respondent's motion for summary judgment (R. 3). An appeal was taken to the United States Court of Appeals for the Fourth Circuit where the order of the District Court was affirmed (R. 10).

The sole issue is whether the taxpayer may amortize the expenses of his election as City Councilman from the income subsequently received from the office.

II

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code. 28 U. S. C. A. 347 (a):

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

III

QUESTION PRESENTED

May the expenses of the taxpayer in his campaign for election as City Councilman be amortized against taxable income received by him after election to that office?

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case involves "an important question of Federal law, which has not been, but should be settled by this Court." Supreme Court Rule 38, Par. (5) (b). In *McDonald v. Commissioner,* 323 U. S. 57 (1944), this Court held that campaign expenses were not deductible expense items in a case involving an unsuccessful candidate for a judgeship.

There the expenses were incurred because of a hope or expectation of income from public office. The decision did not pass upon the instant situation where the hope or expectation has ripened into fulfillment and the taxpayer seeks to amortize his campaign expenses or offset them against the income actually received from the office, not to deduct them generally. This was not the question decided by the *McDonald case* nor has it ever been decided by this Court.

The result of the decision below is to subject the taxpayer and others in similar situations to tax upon gross rather than net income. Such a result on this question has not been made the law of the land by this Court.

WHEREFORE your petitioner prays that a writ of *certiorari* issue under the Seal of this Court, directed to the United States Court of Appeals for the Fourth Circuit commanding said Court to certify and send to this Court a full and complete transcription of the record and of the proceedings of the said United States Court of Appeals for the Fourth Circuit in the case numbered and entitled on its docket, No. 6527, *Elizabeth B. Mays, Sole Legatee of the Estate of Fred L. Mays, Deceased, Appellant, v. William P. Bowers, Collector of Internal Revenue for the District of South Carolina, Appellee,* to the end that this cause may be

reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said United States Court of Appeals for the Fourth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

JOHN H. LUMPKIN,
Counsel for Petitioner.

BOYD, BRUTON & LUMPKIN,
Of Counsel.

SUPPORTING BRIEF

Statement of Case

Fred L. Mays was elected to the Columbia, South Carolina, City Council in the spring of 1946. His term, under South Carolina Statutes, was for four years—from June 1, 1946, through May 30, 1950. (Section 7599, 1942 Code.) There is no statutory provision for a removal from office. The compensation of City Councilmen was $4,000.00 per year. It is stipulated that he spent $2,355.31 in his campaign for election (R. 5, 6).

The respondent included in the petitioner's taxable income the entire amount of his compensation as City Councilman but refused to permit this compensation to be offset by his necessary expenses in his campaign for election to that office. The action of the respondent was taken on the authority of this Court's decision in *McDonald v. Commissioner,* 323 U. S. 57 (1944) and Treasury Regulation 111, Section 29.23 (a)-15.

Argument

The decision of this Court in the *McDonald case, supra,* and also Treasury Regulation 111, Section 29.23 (a)-15 prohibit the deduction of campaign expenses, but do not indicate that it would be improper for such expenses to be an offset to income received from the office, for election to which the expenses were incurred.

Section 23 (1) of the Internal Revenue Code provides that in computing income there shall be allowed as a deduction "a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)" of property used in the trade or business or held for the production of income.

Regulation 111, Section 29.23 (1)-3 provides that this deduction shall be allowed as an offset to the income from

intangible assets. Illustrations given are patents and copyrights, licenses and franchises. The expenses of an advertising campaign resulting in the taxpayer obtaining remunerative contracts were held amortizable under this Regulation over the lives of the contracts in *United Profit-Sharing Corp. v. United States,* 66 Ct. Cls. 171 (1928).

There can be no question of public policy prohibiting the credit. *Lilly et al. v. Commissioner,* 343 U. S. 90, 72 S. Ct. 497. The expense was a necessary one. *Commissioner v. Heininger,* 320 U. S. 476, 64 S. Ct. 249. It cannot be deemed a personal expense since it produced taxable income. Even gambling losses can be offset against gambling income. It would be astonishing if this result, allowed to gamblers, is not allowed to public officials.

Respectfully submitted,

JOHN H. LUMPKIN,
Counsel for Petitioner.

BOYD, BRUTON AND LUMPKIN,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	3
Conclusion	5
Appendix	6

CITATIONS

Cases:

McDonald v. *Commissioner*, 323 U. S. 57	3, 4, 5
United Profit-Sharing Corp. v. *United States*, 66 C. Cls. 171	4

Statute:

Internal Revenue Code, Sec. 23 (26 U.S.C. 1946 ed., 23)	3, 4, 6

Miscellaneous:

Treasury Regulations 111:

Sec. 29.23(a)-15	3, 7
Sec. 29.23(l)-3	4, 8
Sec. 29.23(o)-1	8

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v.

WILLIAM P. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF SOUTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 3-5) is reported at 106 F. Supp. 337. The opinion of the Court of Appeals (R. 10-13) is reported at 201 F. 2d 401.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1953. (R. 13.) The petition for a writ of certiorari was filed on April 10, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether expenses of the deceased taxpayer incurred in campaigning for election as City Councilman may be amortized over the term of the office to which he was elected and deducted, under Section 23 (l) of the Internal Revenue Code, from his salary.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Regulations are set forth in the Appendix, *infra*, pp. 6-8.

STATEMENT

The taxpayer, Fred L. Mays, was elected in May, 1946, to the City Council of Columbia, South Carolina, for a term of four years beginning June 1, 1946, and ending May 31, 1950. (R. 6.) In the course of his campaign for office he incurred expenses amounting to $2,355.31. This sum included the cost of a barbecue, hire of automobiles, wages for poll watchers, and entrance fee and newspaper and radio advertising. (R. 6, 11.)

The position of City Councilman carried a salary of $4,000 per year, so that taxpayer received an income of $2,333.34 (7/12 of $4,000 from this position in 1946, and $4,000 in 1947. This income was duly reported and a tax paid thereon. (R. 6.) In 1949, taxpayer filed refund claims for 1946 and 1947, claiming that a portion of the campaign expenses was deductible from the salary received in each of those years. (R. 7.) The claims for refund

were rejected. Suit was brought in the District Court by the petitioner herein, taxpayer's widow and sole legatee, taxpayer having died in October of 1949. (R. 5, 7.) The District Court on the basis of the stipulated facts (R. 5-7) granted the Collector's motion for summary judgment (R. 5). On appeal, the District Court's order was affirmed by the Court of Appeals. (R. 13.)

ARGUMENT

This case does not warrant further review. It was correctly decided below under principles established by *McDonald* v. *Commissioner,* 323 U. S. 57, and no conflict of decisions is presented.

In the *McDonald* case, this Court held that campaign expenses are not deductible as business expenses or expenses of producing income under Section 23(a) or as losses under Section 23(e) (both Appendix, *infra,* pp. 6-7) and this decision is determinative here. The fact that the taxpayer was elected to the office for which he campaigned, instead of being defeated, is not a valid basis for distinguishing the *McDonald* case. As the court below held (R. 11), correctly we believe, the rationale of that case applies equally to preclude deduction of any campaign expenses, regardless whether the candidate is elected to office. See also Section 29.23 (a)-15 of Regulations 111 (Appendix, *infra,* p. 7).

Petitioner's contention (Br. 5-6) that her deceased husband was entitled to spread the campaign expenses over the term of the office and to deduct a ratable portion each year under Section

23(l) of the Code (Appendix, *infra*, p. 7) is without merit. Section 23(l) permits deductions annually for exhaustion or obsolescence of property used in a business or of property held for the production of income, and under Section 29.23(l)-3 of Regulations 111 (Appendix, *infra*, p. 8) deductions may be taken for exhaustion of intangible property, the use of which is limited in duration, but not including good will. But the campaign expenses sought to be amortized here were not themselves property used in the business of being a public officer or property held for the collection of income. Instead, they were expenditures made and the cash spent was no longer held. Further, the decedent acquired no property, used in his business of being a councilman, or income producing property as a result of his expenses, which could be amortized under Section 23(l). As was stated in the *McDonald* case, p. 61, the campaign expenses did not "buy the election", but only an "opportunity to persuade the electors". The expenses were in the nature of expenditures to acquire personal good will and their deduction was expressly prohibited by Section 29.23(l)-3 of Regulations 111.

United Profit-Sharing Corp. v. *United States*, 66 C. Cls. 171, cited by petitioner but not alleged to be in conflict with this case (Br. 6), permitted business advertising expenses, spent to acquire certain contracts for sale of the corporation's product, to be amortized. In contrast here, the campaign expenses were not expenses of the decedent's business of being a councilman and did not "buy" the

office. *McDonald* v. *Commissioner, supra.* The court below correctly observed (R. 12) that there is "little if any analogy" between the two types of expenditures.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
HELEN GOODNER,
ALONZO W. WATSON, JR.,
Special Assistants to the Attorney General.

MAY, 1953.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In general.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade of business; * * *

* * * *

(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the tax-

able year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *

* * * *

(l) [As amended by Sec. 121(c) of the Revenue Act of 1942, *supra*] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * *

(26 U.S.C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.23(a)-15. *Nontrade or Nonbusiness Expenses.*—

* * * *

(b) * * *

Among expenditures not allowable under section 23(a)(2) are the following: * * * campaign expenses of a candidate for public office * * *.

* * * *

Sec. 29.23(l)-3. *Depreciation of Intangible Property.*—Intangibles, the use of which in the trade or business or in the production of income is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses, and franchises. Intangibles, the use of which in the business or trade or in the production of income is not so limited, will not usually be a proper subject of such an allowance. If, however, an intangible asset acquired through capital outlay is known from experience to be of value in the business or in the production of income for only a limited period, the length of which can be estimated from experience with reasonable certainty, such intangible asset may be the subject of a depreciation allowance, provided the facts are fully shown in the return or prior thereto to the satisfaction of the Commissioner. No deduction for depreciation, including obsolescence, is allowable in respect of good will.

* * * *

Sec. 29.23(o)-1. *Contributions or Gifts by Individuals.*—

* * * *

* * * and contributions for campaign expenses, are not deductible from gross income.

* * * *

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